IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

FIRST APPEAL NO.161 OF 1990

The Regional Director
Employees' State Insurance
Corporation ... Appellant

V/s.

1. Smt.Laxmibai Balaram
2. New Mahalaxmi Silk Mills (P) Ltd.... Respondent

Mr.H.V. Mehta for Appellant

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JANUARY 13, 2005**

JUDGEMNT:

. The short question involved in the present appeal is whether the deceased could be considered an employee as defined under section 2(9) of the Employees State Insurance Act and, whether dependants' benefit is payable to the heirs of the deceased.

2. The undisputed facts are as follows:

One Balram Pachayya was employed as a weaver in Respondent No.2-Mill. He was covered under the provisions of the Employees State Insurance Corporation Act from the day he joined employment. it appears that on 24.11.1984, Balram complained of a pain in his neck

during the course of his employment. He was therefore, admitted to MGM hospital. He expired in the hospital on 4.12.1984. The wages paid to Balram for working for 21 days in November 1984 were Rs.814.73 @ Rs.40.22 per day. Respondent No.1 who is the wife of Balram claimed dependents' benefit from the appellant. This claim was denied by the appellant-Corporation by its letter dated 6.4.1985 since Balram was not a employee as defined under section 2(9) of the ESI Act. The appellant-Corporation was of the view that since the wages of Balram exceeded Rs.1000/- (which was the limit for coverage under the ESI Act at the relevant point of time) his dependents were not entitled to any benefit.

3. Being aggrieved by this denial, Respondent No.1 filed a claim under the ESI Act before the ESI Court being Application (ESI) No.75 of 1985. The ESI Court held, by relying on the judgment of the Division Bench of this Court in the case of *Mohammed Ismail Ansari v/s. E.S.I.C. Bombay*, **1979 II LLJ 168**, that the deceased Balram was an employee within the meaning of section 2(9) of the Act and therefore his dependents were entitled to benefit under the provisions of the Act and the regulations framed thereunder w.e.f. 4.12.1984.

4. Mr.Mehta, learned Advocate appearing for the Appellant, has raised several contentions to impugn the

judgment and order of the ESI Court. He submits that an employee who is drawing more than Rs.1000 per month is not entitled to any benefits under the Act since he is not an employee under section 2(9) of the Act. He submits that the deceased was drawing more than Rs.1000/- per month since September, 1984 despite which the employer had deducted contributions from his wages.

5. Mr.Mehta submits that what is to be considered as wages for bringing a person within the purview of section 2(9) of the Act is not confined to the amount which he actually earned but the wages which an employee would have been entitled to had he worked for all the days of the month.

6. Admittedly, the employee worked for only 21 days in November, 1984, before his death. The learned Advocate submits that if the reasoning of the ESI Court is accepted, then hypothetically, the dependants of an employee who draws an amount exceeding Rs.1000/- per month, would be entitled to dependant benefit, if he had worked only for a couple of days in the month. Such an employee according to the learned Advocate, would admittedly be out of the purview of the ESI Act despite which his heirs would be entitled to the benefit under the Act. The learned Advocate submits that this could not be the object of the Act to pay benefits to persons

who are not employees under section 2(9) of the Act and, therefore, not covered by the Act.

7. This question agitated by Mr.Mehta for the appellants is no longer *res integra* by virtue of the judgment of the Division Bench of this Court in the case of *Mohammed Ismail Ansari (supra)*. The Division Bench has considered the provisions of the Act and has held that the wages actually earned by an employee are to be considered. After examining the provisions of the Act and the relevant definitions, the Division Bench has observed thus:

> 7. ... The year is divided into two "contribution" and "benefit" periods, each period consisting of six such months, as are indicated in Regulation No.3 against each group of workers. The appellant belongs to "B" set, his first period covers March to September, while second period covers October to February. The combined effect of S.2(9) and S.2(22) is that his wages in a month go to determine if he was an "employee" in that month. This firstly takes notice of the fact that the wages of the employee fluctuate from month to month depending on the fluctuating price index, and further assumes that, a person can be an employee within the meaning of the Act during one month and ceases to be such an employee in the next month depending on his total wages earned by him in each month. Wording of S.46(1)(c) suggests, that, his wages during the month of the accident is determinative of his being entitled to the disablement benefit. This may result in depriving him of his right thereunder if his wages in the month of the accident exceeds Rs.500 and consequently make him not an employee. The above proviso to S.2(9)(b) comes to his rescue in such a case in a limited manner. It enables him to continue to be an employee during the other five months of any

> contribution period, even if his actual wages, whether paid or payable in the first month of that period, did exceed Rs.500 within the meaning of the Act. The proviso carves out an exception to benefit the workman. The vexed phraseology of the proviso "a month at any time after (and not before) the beginning of the contribution period", in our opinion, is intended to make the wages of the first of the concerned contribution period, determinative of his claim to be an employee within the meaning of the Act. This, no doubt, is a fiction introduced in the proviso to protect the workmen to enable them to reap the benefits of the contributions made by ;them in earlier periods. ....

8. Similarly, in First Appeal No.20 of 1990 and 83 of 1990, a learned Single Judge of this Court held after relying on the judgment in the case of *Mohammed Ismail Ansari* (supra) that the wages actually drawn per month are to be considered to determine whether an employee falls within the definition of section 2(9) of the Act.

9. Mr.Mehta relies on the judgment of the Division Bench of the Madras High Court in the case of *Employees State Insurance Corporation v/s. M.Ganesan,* **2003 (98) FLR 354.** The Madras High Court, however, has taken a contrary view and has held thus:

> 10. For claiming the disability benefit, it is a pre-condition that the employment injury should have been sustained at a time when the person was an employee. The fact that such an employee had made contribution during the preceding contribution period and would be entitled to the sickness, maternity and other benefits provided under the other sub-clauses of section 46(1) would not on that score enable

> that employee to claim the disability benefit as well for an employment injury sustained during the benefit period. To hold otherwise would do violence to the clear language employed in section 46(1)(c). A person who crosses the prescribed wage limit after the commencement of a contribution period is deemed to be an employee till the end of that contribution period and not beyond. Though he is allowed to enjoy certain benefits during the corresponding benefit period he does so not as an "employee", but as a person who was an employee during the relevant contribution period. An employment injury sustained during such benefit period, when he had ceased to be an employee on account of crossing the prescribed wage limit and the contribution period during which he crossed the wage limit also having ended, will not be an injury sustained by him as an "employee". Disability benefit would not become payable to such a person.

10. I am bound by the judgment of our Court in *Mohammed Ismail Ansari* (supra). There is no dispute that the deceased was paid an amount less than Rs.1,000/- for the days he had actually worked in the month of November, 1984. This is the amount which has to be taken into consideration while deciding whether the dependants' benefit should be paid. In any event the wages of the deceased exceeded Rs.1,000/- only from September, 1984. The deceased had already contributed towards the ESI Scheme and therefore, his dependants were entitled to the benefit under the Act, for the corresponding benefit period. The ESI Court has rightly found that dependents' benefit is payable to Respondent No.1.

11. In the result, First Appeal is dismissed. No costs.